

PATRICIA R. WILSON
Claimant

MARCH INC.
d/b/a ASSISTED HEALTH CARE
Respondent

AIG CLAIM SERVICES, INC.
Insurance Carrier

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ORDER

Those are the only issues before the Appeals Board for its consideration at this time.

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds the Order of the Administrative Law Judge should be affirmed.

Claimant began working for respondent on September 29, 1998. Her duties involved several clerical responsibilities, including filing, answering the telephone, directing telephone calls, computer work, various types of paperwork, collecting and alphabetizing time slips and generalized secretarial and clerical duties. On May 29, 2001, claimant struck her right arm on a door. She felt pain in her elbow and later developed pain in her hand. She advised her supervisor approximately 45 minutes later and was referred to Comp Care for treatment. Claimant also testified that as a result of the right arm injury, she began utilizing her left arm on a regular basis to compensate for the problems in the

right. This caused her to develop problems in her left upper extremity as well. Claimant underwent conservative treatment, including EMGs, and was diagnosed with bilateral carpal tunnel syndrome and some mild bilateral cubital tunnel syndrome as well, although that did not show on her EMGs. As a result, claimant was recommended for an endoscopic carpal tunnel release, which she agreed to undergo.

Respondent contends that claimant's work duties were not sufficient to cause a repetitive-trauma type injury. In support of its position, it presented the testimony of Chris M. Hane, the director of planning and development and claimant's immediate supervisor, and of Gary P. March, the president and owner of Assisted Health Care. Both Mr. Hane and Mr. March testified regarding claimant's ongoing responsibilities. There is some dispute regarding the amount of time claimant spent performing clerical work, computer entries and answering the telephone. Respondent contends that the medical evidence presented is based upon an inaccurate history given by claimant concerning her job duties and, thus, should be rejected by the Board for purposes of causation.

In workers' compensation litigation, the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which that right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

In order for a claimant to collect workers' compensation benefits, that claimant must suffer an injury arising out of and in the course of her employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of employment" relates to the time, place and circumstances under which the accident occurred and means the injury happened while the worker was at her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

While the evidence is somewhat conflicting regarding claimant's ongoing work responsibilities, the Board finds for the purposes of preliminary hearing that claimant has

proven that she suffered accidental injury arising out of and in the course of her employment. Claimant's duties involved numerous fairly hand-intensive activities. The Board finds that the award of preliminary benefits in this matter should be affirmed.

Respondent contends that claimant should be denied temporary total disability compensation as claimant has applied for and has qualified for unemployment benefits and, therefore, is not qualified for temporary total disability compensation.

K.S.A. 44-534a grants the Administrative Law Judge the authority to award temporary total disability compensation when appropriate. The Appeals Board is limited in its review of preliminary decisions to situations where it is alleged the Administrative Law Judge exceeded his or her jurisdiction in granting or denying the relief requested. See K.S.A. 44-551(b)(2)(A).

Preliminary hearing findings with regard to the following disputed issues are considered jurisdictional and subject to review by the Board:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

Under K.S.A. 44-534a, the Administrative Law Judge clearly has jurisdiction to decide claimant's entitlement to temporary total disability compensation. Right or wrong, that decision is not appealable to the Board from a preliminary hearing.

The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly, but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision, but the right to enter upon inquiry and make a decision. Taber v. Taber, 213 Kan. 453, 516 P.2d 987 (1973); Provance v. Shawnee Mission U.S.D. No. 512, 235 Kan. 927, 683 P.2d 902 (1984).

The Appeals Board finds that the Administrative Law Judge did have the jurisdiction to decide claimant's entitlement to temporary total disability compensation at preliminary hearing and the Board does not have jurisdiction to consider that issue at this time. The respondent's appeal as to that issue is, therefore, dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A. N. Sample dated December 12, 2001, should be, and is hereby, affirmed with regard to whether claimant suffered accidental injury arising out of and in the course of her employment. Respondent's appeal with regard to claimant's entitlement to temporary total disability compensation is hereby dismissed.

IT IS SO ORDERED.

Dated this ____ day of February 2002.

BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director